

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
W. H. Morton & Co. Incorporated :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Corporation Franchise Tax :  
under Article 9A of the Tax Law :  
for the Years 1976 & 1977

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State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of April, 1981, he served the within notice of Decision by certified mail upon W. H. Morton & Co. Incorporated, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

W. H. Morton & Co. Incorporated  
American Express Plaza  
New York, NY 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this  
10th day of April, 1981.

*Ernie A. Haglund*

*[Signature]*

STATE OF NEW YORK  
STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
W. H. Morton & Co. Incorporated :  
: AFFIDAVIT OF MAILING  
for Redetermination of a Deficiency or a Revision :  
of a Determination or a Refund of :  
Corporation Franchise Tax :  
under Article 9A of the Tax Law :  
for the Years 1976 & 1977 :

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State of New York  
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 10th day of April, 1981, he served the within notice of Decision by certified mail upon Gwendolyn M. Parker the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ms. Gwendolyn M. Parker  
Tax Office, American Express Plaza  
New York, NY 10004

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this  
10th day of April, 1981.

*Connie A. Haglund*

*J. Vredenburg*

STATE OF NEW YORK  
STATE TAX COMMISSION  
ALBANY, NEW YORK 12227

April 10, 1981

W. H. Morton & Co. Incorporated  
American Express Plaza  
New York, NY 10004

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1090 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance  
Deputy Commissioner and Counsel  
Albany, New York 12227  
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Gwendolyn M. Parker  
Tax Office, American Express Plaza  
New York, NY 10004  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
W. H. MORTON & CO., INCORPORATED	:	DECISION
	:	
for Redetermination of a Deficiency or	:	
for Refund of Franchise Tax on Business	:	
Corporations under Article 9-A of the	:	
Tax Law for the Years 1976 and 1977.	:	

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Petitioner, W. H. Morton & Co., Incorporated, American Express Plaza, New York, New York 10004, filed a petition for redetermination of a deficiency or for refund of franchise tax on business corporations under Article 9-A of the Tax Law for the years 1976 and 1977 (File No. 28379).

A formal hearing was held before Doris Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 3, 1980 at 9:20 A.M. Petitioner appeared by Gwendolyn M. Parker, Esq. The Audit Division appeared by Ralph Vecchio, Esq. (Abraham Schwartz, Esq., of counsel).

ISSUE

Whether petitioner's tax liability for the years at issue was properly recalculated by the Audit Division pursuant to the third alternative method (entire net income plus officers' salaries) of section 210.1(a)(3) of the Tax Law.

FINDINGS OF FACT

1. On October 12, 1979, the Audit Division issued to petitioner, W. H. Morton & Co., Incorporated, two notices of deficiency asserting additional franchise taxes due under Article 9-A of the Tax Law for the years 1976 and 1977, scheduled as follows:

<u>YEAR</u>	<u>DEFICIENCY</u>	<u>INTEREST</u>	<u>TOTAL</u>
1976	\$10,805.07	\$2,366.09	\$13,171.16 <sup>1</sup>
1977	<u>19,990.80</u>	<u>2,678.37</u>	<u>22,669.17</u>
	\$30,795.87	\$5,044.46	\$35,840.33

<sup>1</sup> Reduced to \$11,334.83 by application of credits in the total amount of \$1,836.33 from the years 1974 and 1975.

In 1976, petitioner paid tax in the amount \$450.33, computed on its business and investment capital allocated to this state, in accordance with the method prescribed by section 210.1(a)(2) of the Tax Law; for 1977, petitioner paid the minimum tax of \$250.00.

The aforementioned deficiencies were asserted as a result of the Audit Division's recalculation of petitioner's tax liability based on the third statutory alternative, by which salaries and other compensation paid to officers are added to the taxpayer's entire net income.

2. Until May, 1966, petitioner, a domestic corporation, operated as a dealer in securities. In that month, American Express Company ("Amexco") acquired petitioner as its wholly-owned subsidiary and transferred the state and municipal securities portion of the business to W. H. Morton & Co., Division of American Express ("Division"). Petitioner continued as a dealer in corporate securities until December, 1973, at which time it completely terminated its securities business and began operations as the service arm of Division.

3. During the years at issue, petitioner functioned as record-keeper and paymaster for Division. As a dealer in state and municipal securities, Division is required to make monthly filings with the National Association of Securities Dealers ("NASD"); part of the information required is salary and wages paid to employees during the preceding month. Without petitioner to act as paymaster, Division's employees would be included in the general Amexco payroll and it would be difficult, from an accounting perspective, to segregate the payroll

information needed so that Division's NASD reports could be filed in a timely manner.

4. For 1976, petitioner's officers and their respective positions were as follows:

Robert R. Krumm - Chairman of the Board of Directors and Chief  
Executive Officer  
Charles S. Lipscomb - President  
Frederick L. Devereux III - Vice President  
John F. Thompson - Vice President  
Frank S. DuBell - Vice President  
Harold B. Vicory - Treasurer and Secretary  
John C. Wright - Assistant Treasurer and Assistant Secretary  
Celia E. Fast - Assistant Treasurer and Assistant Secretary  
Elizabeth H. Krist - Assistant Secretary

With the exception of Mr. Devereux who was not a corporate officer in 1977, all of the aforementioned persons retained their offices in said year.

5. Petitioner's board of directors convened on an annual basis for the election of officers, and from time to time to cast votes on special compensation paid to officers.

6. Petitioner's officers expended a minimal amount of time in the performance of the functions of their respective offices. Otherwise, they devoted their time to the business of Division. They are remunerated by petitioner's checks, but under an agreement between petitioner and Division, petitioner is reimbursed therefor, as well as for all other expenses incurred in performing tasks for Division. Petitioner shows payments to officers and employees as salaries and wages on its books, and shows reimbursements from Division as credits.

7. For Federal purposes, petitioner is included in a consolidated return filed by Amexco. For New York State purposes, petitioner files on a separate basis and in conjunction therewith prepares a separate, pro forma Federal Form 1120. Pertinent figures from the "deductions" portion of these pro forma 1120s were as follows:

	<u>1976</u>	<u>1977</u>
Compensation of officers	\$393,828.00	\$685,477.00
Salaries and wages	372,965.00	161,544.00
Other	(836,585.00)	(965,854.00)

The figures shown at "other deductions" were "credits", reflecting reimbursements received by petitioner from Division.

#### CONCLUSIONS OF LAW

A. That section 210.1(a)(3) of the Tax Law makes provision for the income-plus-compensation method of tax liability computation, as follows:

"a tax...(3) computed at the rate of ten per centum on thirty per centum of the taxpayer's entire net income plus salaries and other compensation paid to the taxpayer's elected or appointed officers and to every stockholder owning in excess of five per centum of its issued capital stock minus fifteen thousand dollars (except as hereinafter provided) and any net loss for the reported year, or on the portion of such sum allocated within the state..."

If this method results in a higher tax than that computed under the other statutory alternatives, it must prevail.

B. That an elected or appointed officer includes any officer, irrespective of title, who is charged with and performs any of the regular functions of such office. 20 NYCRR 3-3.2(d).

C. That petitioner's officers were properly considered "taxpayer's elected or appointed officers" for purposes of section 210.1(a)(3) of the Tax Law. The fact that they devoted a majority of their time and energies to the pursuit of the business of the parent corporation does not compel the conclusion that their salaries were the expense of the parent corporation, and not the expense of petitioner. Petitioner's officers were duly elected by vote of the board of directors and carried out the functions associated with their respective offices. Cf. Ter Bush & Powell, Inc. v. State Tax Commission, 58 A.D.2d 691; Matter of Lampert Communications, Inc., State Tax Commission, September 29, 1976.

D. That petitioner improperly reported on its pro forma Federal Form 1120 payments received from Division in consideration of the services rendered

by petitioner's officers to Division; such payments constituted income to petitioner. Further, it was improper reporting procedure to net officers' salaries and reimbursement therefor; petitioner's expenses for officers' salaries may not be so reduced or eliminated.

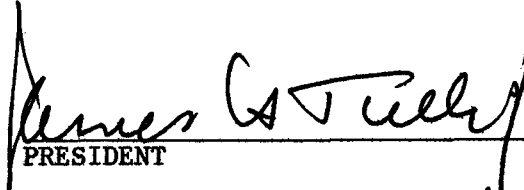
E. That petitioner's franchise tax liability for the years 1976 and 1977 was properly recomputed by the Audit Division in accordance with the method of section 210.1(a)(3) of the Tax Law.


F. That the petition of W. H. Morton & Co., Incorporated is hereby denied, and the notices of deficiency issued October 12, 1979 are sustained in full.


DATED: Albany, New York

APR 10 1981

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER